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No. 00-

IN THE

Supreme Court of the United States

CHICAGO AND NORTHEAST ILLINOIS DISTRICT COUNCIL OF CARPENTERS,

Petitioner,

v.

CONTEMPO DESIGN, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a collective bargaining agreement, signed to end a strike conducted by a labor organization in good faith and signed without economic duress, is void *ab initio* when the strike is later held to be in violation of an earlier collective bargaining agreement provision.

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Petitioner Chicago and Northeast Illinois District Council of Carpenters respectfully requests that a Writ of Certiorari be issues to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The *En Banc* opinion of the United States Court of Appeals for the Seventh Circuit is included as Appendix A. The transcript of the oral ruling rendered by Judge James F. Holderman on August 7, 1998 is included as Appendix B. The August 7, 1998 Decision by the Court: Judgment in a Civil Case issued by the United States District Court for the Northern District of Illinois is included as Appendix C. The Memorandum Opinion and Order issued by Judge James F. Holderman on May 20, 1998 is included as Appendix D.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued an *En Banc* Opinion on August 15, 2000. This Petition for Writ of Certiorari is filed within 90 days of the issuance of the Opinion.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISION INVOLVED

Section 301 of the Labor-Management Relations Act

29 U.S.C. § 185(a)

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined by this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Factual Outline

Contempo is an employer whose business primarily involves the construction and storage of exhibit and displays and/or setting up and taking down exhibits at conventions and trade show. (2a)[1] The Chicago and Northeast Illinois District Council of Carpenters is a union which has been the bargaining representative for the employees of Contempo. On February 15, 1980, Contempo entered into a standardized contract with the Union. (4a) In this contract, commonly known as a "hard card agreement," the Union and Contempo agreed to adopt and be bound by the then-current collective bargaining agreement (CBA) between the Union and the Woodworkers Association of Chicago, Inc. (WAC) as well

1. References "(__a)" are to pages of the Appendix filed pursuant to the Rules of the Supreme Court.

as to any successive CBA unless certain specified termination procedures were complied with. (3a). In pertinent part, the hard card agreement provides as follows:

The EMPLOYER and the UNION do hereby agree as follows (3a-4a):

1. The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION.

2. The parties adopt, and the EMPLOYER agrees to be bound by the terms and conditions of [the current] Collective Bargaining Agreement . . . between the UNION and WAC of Chicago . . . as bargaining agent for their members . . .

3. The [A]greement, and the agreement adopted by reference as aforesaid, shall be in effect as of [date], and remain in effect to and including the expiration date of the agreement adopted by reference. This [A]greement shall continue in effect from year to year thereafter and the parties specifically adopt any agreement entered into between the UNION and WAC of Chicago . . . , bargaining agent for their members, subsequent to the expiration date of the agreement adopted by reference as aforesaid, unless notice of termination or amendment is given in the manner provided herein.

> 4. Either party desiring to amend or terminate this [A]greement must notify the other with an acknowledgment in writing, at least three calendar months prior to the expiration of the then agreement adopted by reference.

Effective as of June 1, 1993, the WAC and Union entered in a collective bargaining agreement for the period of June 1, 1993 through May 31, 1995 (1993 WAC CBA). (4a). Pursuant to the hard card agreement, Contempo and the Union adopted and became bound by the 1993 WAC CBA. (4a). The Union admits that it did not provide written notice at least three months prior to the May 31, 1995 expiration of the 1993 WAC CBA to Contempo of a desire to amend or terminate Contempo's hard card agreement. (5a).

In early June, 1995, Gary Brown, the Business Representative for Local 1027, United Brotherhood of Carpenters and Joiners of America, went to Contempo's place of business and gave Robert Shaw, Contempo's president, a copy of the written proposal for a new contract for the exhibit and display industry. (6a).

On June 14, 1995, Attorney Karl W. Grabemann wrote to the Union's General Counsel to request that the Union "consent" to negotiate a "successor agreement for the period subsequent to May 31, 1995" with display/exhibit employers, including Contempo. (6a). Mr. Grabemann reiterated his desire to negotiate a successor agreement for the individual employers in the exhibit/display industry, including Contempo, in a letter dated June 28, 1995. (6a).

Contempo and the other exhibit employers, through Grabemann, negotiated with Union on July 12, 1995;

July 14, 1995; and July 17, 1995. (6a) Contempo claims that, following the July 17, 1995 negotiations, Grabemann discovered that Contempo and the other employers had entered into hard card agreements with the Union and that these hard card agreements had never been terminated. (6a-7a)

By way of a letter dated July 18, 1995 from Grabemann to the Union, Grabemann broke off the display and exhibit employers' collective bargaining negotiations with Union. (6a). In pertinent part, the July 18, 1995 stated the following:

> The employers that I represent have determined that they are contractually and lawfully entitled to adopt by reference the new or successor Collective Bargaining Agreement between your Union and Woodworkers Association of Chicago, the term of which is from June 1, 1995 to May 31, 2000. Of course, these employers need not elect to be so bound — they *are* so bound contractually and by operation of law.

(6a-7a) (emphasis in original). No additional bargaining occurred after the July 18, 1995 collective bargaining session. (7a).

On July 28, 1995, Contempo and certain other employers in the Chicago-area exhibit/display industry filed an unfair labor practice charge against Union in which they alleged, among other things, that Union had violated the National Labor Relations Act by refusing to recognize that the Contempo and the other charging parties were parties to the 1995 WAC CBA. (71a). On November 30, 1995, the Regional Director of Region 13 of the National Labor

Relations Board (NLRB) notified Contempo and the other employers that she was refusing to issue a complaint on their unfair labor practice charge. (72a). In her letter notifying Contempo of this decision, the Regional Director indicated that, in her opinion, whether Contempo were parties to the 1995 WAC CBA was irrelevant to their unfair labor practice charge. (72a). Accordingly, she issued her ruling without addressing the issue of whether Contempo were parties to the 1995 WAC CBA. (72a). Subsequently, Contempo and the other charging parties appealed the Regional Director's decision to the Office of the General Counsel of the NLRB. (72a). On June 14, 1996, however, the Office of the General Counsel notified Contempo that is was affirming the decision of the Regional Director not to issue a complaint on the foregoing charge. (72a). This was done, again, without addressing the issue of whether Contempo and the other employers were bound by the 1995 WAC CBA. (72a).

The 1995 WAC CBA contains the following "no-strike" provision (7a):

> 5.5 There shall be no strikes, lockouts or stoppage [sic] of work for any causes not covered by this Agreement. The parties will, by lawful means, compel their members to comply with this Agreement.

On March 4, 1995, the Union engaged in a strike of Contempo that was accompanied by picketing at both entrances to Contempo's plant. (7a). The parties dispute whether the strike lasted for one day or two days. (72a). When Contempo's Executive Vice President Korth arrived at Contempo's plant on March 4, 1995, he talked to the Union's representative Gary Brown. (72a). Brown confirmed

that there was a strike and advised Korth to contact Contempo's attorney. (72a).

The Union and Contempo began negotiations in the afternoon on March 4, 1996. (73a). Contempo claims that it informed Union at these negotiations that Contempo was bound by the 1995 WAC CBA; Union denies this claim. (73a). Contempo also claims that the Union told it Contempo had to sign the Contempo CBA; the Union also denies this. (73a). Contempo agreed to sign the Contempo CBA. (73a).

The Union's members voted unanimously to adopt and ratify the Contempo CBA and then Contempo signed it. (73a). The parties dispute whether the Contempo CBA was ratified on March 5, 1996 or March 6, 1996. (73a). However, the Agreement was dated March 5, 1996. (73a).

There are differences between the wage rates and the cost of fringe benefits that Contempo paid its carpenter employees before the Contempo strike under the 1995 WAC CBA compared to the wage rates and fringe benefits that Contempo is obligated to pay under the Contempo CBA. (8a-9a). The annual wage increase for carpenter employees under the 1995 WAC CBA over a term of five years was $.40 the first year, $.40 the second year, $.45 the third year, $.50 the fourth year, and $.50 the fifth year. (73a). The annual wage increase for such employees under the Contempo CBA is $.70 the first year, $.75 the second year, and $.80 the third year. (73a).

There are also differences in the rate of contributions that Contempo must pay to the Chicago District Council of Carpenters Welfare Fund. (9a). Under the 1995 WAC CBA, Contempo was required to pay $3.60 per hour effective June

1, 1996. (74a) The rate that Contempo has to pay under the Contempo CBA is $3.98 per hour. (74a).

Another difference between the two agreements is the time period that each covers. (74a) The 1995 WAC CBA covers the period from June 1, 1995 through May 31, 2000. (9a). The Contempo CBA covers the period from June 1, 1995 through May 31, 1998. (9a)

B. The Proceedings Below

In the summer of 1995, a dispute arose between the Union and a number of employers in the Display and Exhibit Industry as to whether a collective bargaining agreement between the Union and the Woodworkers Association of Chicago also covered the Display and Exhibit employers. Both the employers and the Union filed charges with the National Labor Relations Board. The Labor Board dismissed the employers' charges and then continued the investigation into the Union's charges that the employers, including Contempo, had unlawfully refused to bargain for a successor agreement. (72a).

After the Labor Board indicated to the Union that the Board would issue a complaint on the Union's charges, the Union commenced a strike against Contempo based on the unfair labor practice charges. (72a). The strike began on March 4, 1996. On March 5, 1996, Contempo signed the Industry Agreement that had been negotiated by the Union and several other Display and Exhibit employers. (7a).

In July, 1996, Contempo and five other plaintiffs filed suit against the Union.[2] The Complaint sought, *inter alia*, a declaratory judgment that Contempo was bound to the 1995 WAC Agreement and that the agreement signed by Contempo on March 5, 1996 was void *ab initio*. Contempo also brought a claim based on breach of contract, arguing that the Union's strike was in violation of the no-strike provision in the 1995 WAC Agreement.

On May 20, 1998, Judge James F. Holderman granted that Plaintiffs' Summary Judgment in part, and held that Contempo was bound to the terms and conditions of the 1995 WAC Agreement. (65a). Judge Holderman ruled that the Automatic Renewal provision was not terminated or waived. The Court also denied the Union's argument based on detrimental reliance. Thus, Judge Holderman also held that the Union's strike was illegal because it violated the no-strike clause. However, Judge Holderman refused to grant Contempo's motion as to economic duress in the breach of contract clam or award damages based on his ruling that the strike was illegal.

After a two day trial, Judge Holderman ruled on August 7, 1998 that Contempo was entitled to compensatory damages in the amount of $444,713.87. (46a). This amount includes the $433,139.39 differential in wages and benefits paid by Contempo under the Industry Agreement in excess of the requirements of the 1995 WAC Agreement. (55a).

On August 31, 1999, a three member panel of the United States Court of Appeals for the Seventh Circuit reversed, in

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2. The remaining five Plaintiffs and the Union reached a settlement in August, 1998. There are no issues on appeal that relate to these five Plaintiffs.

part, the decision of the lower court. In particular, the two judge majority reversed the district court's holding that the Contempo CBA was void and its award of the $433,139.39 difference in wages and benefits between the Contempo CBA and the 1995 WAC Agreement.

On August 15, 2000, the *En Banc* Opinion of the United States Court of Appeals for the Seventh Circuit affirmed the district court. (1a).

SUMMARY OF THE ARGUMENT

As Judge Terrance Evans stated in the dissent, "Erasing the second contract as a remedy for the breach of the first contract is a confusing, novel, and open-ended reason for voiding a contract. It is also unfair." (45a).

The Majority Decision affirmed the district court's finding that the Union violated a no-strike provision when it initiated a two-day strike against Contempo in March, 1996. (23a). At the time, the parties hotly contested whether Contempo and the Union were bound to a collective bargaining agreement (the "1995 WAC Agreement"). If the parties were bound, the strike violated the no-strike provision contained in the contract. If the parties were not bound, the strike was a lawful exercise of the Union's rights under the National Labor Relations Act. The Majority Decision found that the 1995 WAC Agreement applied and that the strike was a violation of the no-strike policy.

Rather than implementing the emergency injunctive procedures available to it or simply waiting out the strike and seeking damages, Contempo purposely entered negotiations with the Union for a successor agreement,

arrived at an agreement, and signed a successor collective bargaining agreement (the "Contempo CBA").Now, Contempo seeks the damages attributable to the higher wages and fringe benefits paid under the Contempo CBA. The majority of the initial Seventh Circuit panel reviewing this case rejected Contempo's argument on the basis of basic contract law. However, the *En Banc* decision of the Appellate Court affirmed the lower court, voided the second contract, and awarded Contempo the financial differences in wages and benefits between the two contracts. (39a).

The issue before this Honorable Court is whether the second contract (the Contempo Agreement) survives and supercedes the first contract (the 1995 WAC Agreement). At the heart of the matter, the case represents a misapplication of basic contract law, a threat to the ability of labor organizations to engage in lawful conduct, a split in the circuits as to existing labor relations and contract law.

REASONS FOR GRANTING THE WRIT

Paramount legal issues exist concerning whether the Contempo CBA superceded the 1995 WAC Agreement. Even assuming that Contempo and the Union are bound to the 1995 WAC Agreement, the appellate court erroneously errored in affirming the award of the wage and fringe benefit differentials in its granting of compensatory damages.

A. The Contempo CBA superceded the 1995 WAC Agreement.

The underlying foundation to the employer's claims is the applicability of the 1995 WAC successor agreement. In that contract, the parties agreed that "there shall be no strikes,

lockouts, or stoppage [sic] of work for any causes not covered by this Agreement." (7a). For the reasons which now constitute its defense to this legal action, the Union does not, and did not, recognize the 1995 WAC Agreement as creating a contractual relationship between the Union and Contempo. Indeed, if the Union believed that a contract existed, the Union would not have persisted in its efforts to convince Contempo to return to being a signatory employer.

However, the Seventh Circuit erred in not finding that the Contempo CBA superceded the prior agreement.

The district court agreed with the Union's position at the trial that Contempo did not sign the Contempo CBA under economic duress. (57a). While the trial court found that the Contempo CBA was void *ab initio* because the wrongful conduct of the Union (i.e., the violation of the no-strike provision in the 1995 WAC Agreement), the lower court stated that "I do not believe the evidence showed that the plaintiff or any of the officers of the plaintiff were under such economic duress as to allow a defense to the enforcement of the contract resulting from economic duress." (56a). The district court based its decision on the issue of economic duress on the conduct of the negotiations by the parties, which demonstrated that Contempo's officers were not "bereft of the quality of mind" sufficient for a showing of economic duress. (57a).

Accordingly, even if the lower courts found that the 1995 WAC Agreement applied to Contempo and the strike was illegal, the Contempo CBA is effective. The effective Contempo CBA signed on March 5, 1996 superceded the 1995 WAC Agreement. "When two parties . . . make a new agreement that is inconsistent with the terms of a previous

one dealing with the same subject matter, the later agreement operates to rescind and to discharge by substitution the inconsistent parts of the earlier contract." *Bechtel Corp. v. Laborers Local 215*, 405 F. Supp. 370, 375 (M.D. Pa. 1975), *aff'd in relevant part*, 544 F.2d 1207 (3d Cir. 1976).

Furthermore,

> If the new agreement contains terms that are clearly inconsistent with the previously existing contract . . . , the fact of the inconsistency itself is sufficient indication of intention to abrogate the old and substitute the new . . . It [the new agreement] operates as a discharge by substitution only so far as the inconsistency extends.

Jersey Center Power & Light Co. v. IBEW, 508 F.2d 687, 702-03 & n.44 (3d Cir. 1975), *vacated*, 425 U.S. 987 (1976) (*quoting* 61 Corbib, Contracts § 1296 (1962)).

"Where two collective bargaining agreements are executed by the same parties and cover the same subject matter, the latter supercedes the former only as to inconsistent provisions in the two." *Marine Transport Line, Inc. v. Int'l Ass'n of Masters*, 696 F. Supp. 1, 17 (S.D.N.Y. 1988) (*citing NLRB v. International Union of Operating Engineers*, 323 F.2d 454, 546, 548 (9th Cir. 1963).

"The provisions of the two contracts are inconsistent with each other and since the contracts were entered into by the same parties and cover the same subject matter, it is a well settled principle of law that the later contract supercedes the former contract as to the inconsistent provisions." *Id.*

The Contempo CBA provisions concerning wages, fringe benefit contributions, and length of contract were inconsistent with the 1995 WAC Agreement. Accordingly, by operation of law, the Contempo CBA superceded the 1995 WAC Agreement and the district court erred in the granting of the summary judgment motion and the subsequent awarding of damages.

B. Contempo is not entitled to the wage and fringe benefit differentials awarded as damages from the Contempo strike.

The Seventh Circuit erred in affirming the award to Contempo of the wage and fringe benefit differentials as compensatory damages for the illegal strike. Even if the finding of the illegality of the strike is affirmed, the damages award must be reversed.

The district court based its award solely on the finding that the Union violated the no-strike provision of the 1995 WAC Agreement. (50-55a). However, the court ignored the traditional remedies and procedures available for contractual violations in labor law, namely grievances, arbitrations, and injunctions, and skipped ahead to a massive monetary award by the court. By finding that a violation of a particular clause is sufficient to void a collective bargaining agreement and automatically accord the employer the wage and fringe benefit differentials through litigation, the structure of labor and management working together to resolve conflicts without resort to the courts is endangered.

Moreover, the damages simply do not conform with the dictates of the law.

> The measure of damages recoverable when a labor organization violates § 301 is measured by "the actual loss sustained by the Plaintiff as a direct result of the breach and which may reasonably be supposed to have been in the contemplation of the parties as the probable result of such a breach at the time the agreement was made."

Airco Speer v. Int'l Union of Electrical, Radio & Machine Workers, 479 F. Supp. 246, 256 (W.D. Pa. 1979) (*quoting Eazor Express v. Teamsters*, 520 F.2d 951, 966 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976)).

Based only on the finding that the Contempo strike was illegal, the Plaintiff is not entitled to recover the wage and benefit payments that exceeded the expenses it would have incurred under the 1995 WAC CBA. In order to recover this amount, Contempo must show that the Contempo CBA was signed in March 1996 under economic duress. The district court, at the conclusion of the trial, ruled that the Contempo CBA was not the product of economic duress.

The mere finding that the Union violated the no-strike provision in the 1995 WAC Agreement is insufficient for an award of the wage and benefit differentials because those damages are not the "direct result of the breach and which may reasonably be supposed to have been in the contemplation of the parties as the probable result of such a breach at the time the agreement was made." *Id.*

If the district court had believed that the law authorized compensatory damages on the basis of a violation of the no-strike provision, the district court should have set the case

for a prove-up of damages. By setting the matter for trial, the district court recognized that the law did not provide for the wage and fringe benefit differential without a finding of economic duress. However, the district court reversed this logical and well-founded reasoning at the conclusion of the trial. Thus, the trial accomplished no purpose and failed to make any finding more beneficial to the Plaintiff than that already made in the partial grant of the summary judgment.

CONCLUSION

The fundamental issue in this case is whether the Contempo CBA superceded the 1995 WAC Agreement when the employer signed an agreement — not under economic duress — that contained inconsistent terms dealing with length of the agreement, wages and fringe benefit contributions.

During the trial, the parties were forced to work from the court's earlier ruling that the Contempo strike was illegal. However, the testimony at the trial showed that the Contempo CBA signed in March 1996 was not the product of economic duress. Accordingly, the lower court abused its discretion in awarding the wage and fringe benefit differentials to Contempo solely on the basis that such amounts were to be included as compensatory damages.

For the reasons set forth herein, the Chicago and Northeast Illinois District Council of Carpenters respectfully requests that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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